TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1923

No. [redacted]74

THE SALEM TRUST COMPANY, PETITIONER,

vs.

MANUFACTURERS' FINANCE COMPANY *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 10, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 6, 1922.

(29,024)

(29,024)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 474.

THE SALEM TRUST COMPANY, PETITIONER,

vs.

MANUFACTURERS' FINANCE COMPANY *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1922.

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1 United States Circuit Court of Appeals for the First Circuit,
October Term, 1920.

No. 1515.

THE SALEM TRUST COMPANY, Plaintiff, Appellant,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants, Appellees.

Transcript of Record of District Court.

No. 1058, Equity Docket.

THE SALEM TRUST COMPANY, Plaintiff,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants.

This cause was begun in the Superior Court of the County of Suffolk and Commonwealth of Massachusetts, and was thence removed from said Superior Court and entered in this District Court, at the December Term, A. D. 1920, and is in the words and figures following:

Record of State Court.

[Filed in District Court January 10, 1921.]

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case:

2 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

In Equity.

Between

THE SALEM TRUST COMPANY, a Banking Corporation Organized under the Laws of the Commonwealth of Massachusetts, with a Usual Place of Business in Salem, Essex County, Massachusetts, Plaintiff,

and

MANUFACTURERS' FINANCE COMPANY, a Corporation Organized under the Laws of the State of Delaware and Having a Usual Place of Business in Boston, Suffolk County, Massachusetts, and The International Trust Company, a Banking Corporation Organized under the Laws of the Commonwealth of Massachusetts, with a Usual Place of Business in said Boston, Defendants.

Bill in Equity.

Bill of Complaint.

1. The plaintiff says that at and prior to the 16th day of May, 1919, it had loaned to the Nelson Blower & Furnace Company the sum of forty-thousand dollars ($40,000) upon its note secured by the pledge of sundry forms of collateral, at all times agreed to be in excess of the amount of said loan, said collateral consisting in part of cash and personal property and in part of assigned accounts of money due to the said corporation; that on or about said date, the Nelson Blower & Furnace Company desired to procure a release of one of said assigned accounts due from the Remington Arms Union Metallic Cartridge Company, and to substitute another similar account of another corporation in its room and stead. The plaintiff agreed to said substitution and the Nelson Blower & Furnace Company thereupon executed an assignment of sums of money then due or thereafter to become due from the Murray & Tregurtha Corporation, by an instrument in writing, a copy of which is hereto annexed and marked "Exhibit A". That thereafter, to wit, on or about the fifteenth day of July, 1919, the said Nelson Blower & Furnace Company executed, or attempted to execute, to the
3 said defendant, the Manufacturers' Finance Company, an assignment of the same account arising out of the same contract with the Murray & Tregurtha Corporation, and without disclosing to it, as the plaintiff believes, the prior assignment to the Salem Trust Company, Exhibit A; that on September 26, 1919, the said Nelson Blower & Furnace Company was placed in the hands of a receiver by a decree of the District Court of the United States for

the District of Massachusetts, sitting at Boston, and that thereafter the receiver, F. Alexander Chandler, conducted said business until sometime in April of the year 1920, when all manufacturing operations were terminated.

2. The plaintiff says that at or about the time of said receivership, it learned for the first time of the assignment of accounts to the Manufacturers' Finance Company, and that thereupon both parties claimed the proceeds then due or thereafter to become due from the said Murray & Tregurtha Corporation. The plaintiff further says that the accounts assigned to it and now claimed by the Manufacturers' Finance Company were payments due and to become due upon a contract for the construction of thirty (30) engines for the said Murray & Tregurtha Corporation, from materials which it supplied; that at the time of said receivership the contract for the construction of said engines was only partially completed and that by reason of said partial completion, the Murray & Tregurtha Corporation claimed that there was nothing due until such time as the contract was fully completed; that the receiver of the Nelson Blower & Furnace Company was unwilling to complete said contract on account of said assignments and because by so doing the labor expended was likely to be lost to him and the proceeds thereof to become due and payable to the plaintiff or to the defendant, the Manufacturers' Finance Company.

3. The plaintiff further says that in order to expedite and secure the performance and completion of said contract, and the collection of such balance as might be due from the Murray & Tregurtha Corporation, the plaintiff assigned to the defendant, the Manufacturers' Finance Company, all its claims against the Murray & Tregurtha Corporation, by an instrument in writing, a copy of
4 which is hereto annexed and marked "Exhibit B", and that simultaneously with said assignment, the defendant, the Manufacturers' Finance Company, likewise agreed by an instrument in writing, a copy of which is hereto annexed and marked "Exhibit C", to accept the same and collect the proceeds in trust for itself and the Salem Trust Company, and to deposit the said proceeds in a special account with the defendant, the International Trust Company, and that the same should be paid to whomever should be entitled to them, as determined by agreement of the parties or some court of competent jurisdiction.

4. The plaintiff says that as a further step to secure the performance and completion of said contract by the receiver, the defendant, the Manufacturers' Finance Company, the plaintiff's consent, entered into an agreement with the receiver on or about the 6th day of October, 1919, by the terms of which the receiver agreed to perform the contract, to pay himself for the labor expended, and to turn over the surplus to the parties entitled thereto and to permit them to collect it upon their own account, and that said agreement was thereafter, on or about December 17, 1919, reduced to writing by in-

strument, a copy of which is hereto annexed and marked "Exhibit D".

5. The plaintiff further says that the receiver completed the contract with the Murray & Tregurtha Corporation and that he paid himself for all moneys that were due for the work of said completion, and that he paid, or caused to be paid, to the Manufacturers' Finance Company, the balance then due, amounting to $8,634.10; that the Manufacturers' Finance Company has deposited the said moneys with the International Trust Company, which now holds them, and it brings this Bill in Equity to establish its rights to said funds and to have an order for their payment to it, and for such other and further relief as to the Court seems proper.

Wherefore the plaintiff prays:

1. That its right to said fund may be established and that the defendants may be ordered to deliver and pay the same to the plaintiff.

2. That a preliminary injunction may issue restraining
5 the defendants from withdrawing the said fund, referred to in paragraph 5 of the bill of complaint, or paying the same to any person until further order.

3. For such other and further relief as to the Court seems proper.

SALEM TRUST COMPANY. [SEAL.]
By HARRY N. WILKINS,
Treasurer,
By Its Attorneys,
HARPER & BURHOE.

COMMONWEALTH OF MASSACHUSETTS,
Essex, ss:

October 21, 1920.

Then personally appeared Harry N. Wilkins, the treasurer of the Salem Trust Company, and upon being duly sworn, does on oath depose and say that he has read and subscribed the foregoing bill in equity, that the allegations of fact, so far as made upon his knowledge, are true and that as to the others, he believes them to be true, before me.

[Notarial Seal.] ALFONS F. FISHER,
Notary Public.

[MEMORANDUM.—By agreement of counsel, Exhibits "A", "B", "C" and "D" referred to in the foregoing bill of complaint as annexed are omitted from this Transcript of Record. James S. Allen, Clerk.]

This bill was entered and filed in our said Court on the twenty-fifth day of October, A. D. 1920, when and where the Plaintiff appeared by Messrs. Harper and Burhoe, its attorneys, as aforesaid.

And the following was endorsed on said Bill of Complaint, to wit:

"SUFFOLK, *ss:*

Boston, 25 Oct., 1920.

Notice ordered to issue, returnable into this Court at said Boston, in the Equity Session, First Division thereof, on Friday the twenty-ninth day of October, 1920, at 10 o'clock a. m., to show cause why an injunction should not issue, as prayed for in the plaintiff's bill, with temp. restrng. order 2d prayer.

Att.: H. E. BELLEW,
Asst. Clerk."

Whereupon the following was issued by our said court, to wit:

6 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

[SEAL.]

To Manufacturers' Finance Company, a corporation organized under the laws of the State of Delaware and having a usual place of business in Boston, in our said county of Suffolk, and the International Trust Company, a banking corporation organized under the laws of said Commonwealth and having an usual place of business in said Boston, respondents, Greeting:

We command you that you appear before our Superior Court, at the rules to be holden at Boston, within our County of Suffolk, on the first Monday of December next, then and there to answer to a bill of complaint exhibited against you in our said Court, in the County of Suffolk, by The Salem Trust Company, a banking corporation organized under the laws of said Commonwealth, with an usual place of business in Salem, Essex County.

And you are hereby notified to appear before some one of the Justices of this Court, at the Equity Session, First Division, in the court house in Boston, in said County of Suffolk, on Friday, the twenty-ninth day of October, A. D. 1920, at 10 o'clock, a. m., to show cause why an injunction should not issue, as prayed for in said Bill of Complaint; and in the meantime and until such hearing you the said respondents, your agents, attorneys, and counsellors and each and every of them are restrained from withdrawing the fund of $8,634.10 mentioned in paragraph 5 of the bill and to do and receive what our said Court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties, in the law, in that behalf provided.

Witness, John A. Aiken, Esquire, at Boston, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and twenty.

HENRY E. BELLEW,
Asst. Clerk.

Subsequently on the twenty-ninth day of October, 1920, said subpœna, notice and restraining order *was* returned into
7 court, with the following return endorsed thereon by the officer who served the same, to wit:

"SUFFOLK, *ss:*

Boston, October 26, 1920.

I this day summoned the within named respondents, each to appear and answer and also to show cause at court as within directed by delivering to A. E. Garland, Esq., assistant secretary and officer in charge of the business of the within named respondent, the International Trust Company, and by delivering to George L. Bitty, Esq., assistant treasurer and officer in charge of the business of the within named Manufacturers' Finance Company, each an attested copy of this precept.

EDMUND P. KELLY,
Deputy Sheriff."

Service & Travel.....	2.10
Copies	2.00
	$4.10

On said twenty-ninth day of October, 1920, the following appearances in writing were entered, to wit:

SUFFOLK, *ss:*

Superior Court, Sitting —— —, 19—.

No. 18272. Eq.

SALEM TRUST CO., Plff.

v.

MFRS. FINANCE CO. & Others, Dfts.

Appearance.

In the above action we appear for the defendant Manufacturers' Finance Company.

STOREY, THORNDIKE, PALMER & DODGE.
735 Exchange Bldg.

SUFFOLK, *ss:*

Superior Court, Sitting —— —, 19—.

No. 18272. Equity.

SALEM TRUST CO., Plff.,

v.

MFG. FINANCE CO. & Another, Deft-.

Appearance.

In the above action I appear for International Trust Co.

T. F. MEGAN,
45 Milk St.

Afterward, to wit: on the sixth day of December, 1920, said defendant, International Trust Company, filed its sworn answer as follows, to wit:

8 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

In Equity.

SALEM TRUST COMPANY

vs.

MANUFACTURERS' FINANCE COMPANY et al.

Answer of Defendant International Trust Company.

Now comes the defendant, International Trust Company, and in answer to said bill as follows:

(1) The defendant neither admits nor denies the allegations set forth in paragraph one of the bill, but leaves the plaintiff to prove the same.

(2) The defendant neither admits nor denies the allegations set forth in paragraph two of the bill, but leaves the plaintiff to prove the same.

(3) The defendant neither admits nor denies the allegations set forth in paragraph three of the bill, but leaves the plaintiff to prove the same.

(4) The defendant neither admits nor denies the allegations set forth in paragraph four of the bill, but leaves the plaintiff to prove the same.

(5) In answer to paragraph five of the bill, the defendant says that the defendant, Manufacturers' Finance Company has had a deposit in the International Trust Company standing in the name of Manufacturers' Finance Company, Trustee, that the above-named account has been carried in the International Trust Company since July 21, 1920, that at the date of the service of the subpœna in this action upon your defendant there was on deposit to the credit of the Manufacturers' Finance Company, Trustee, in this account, the sum of seven thousand nine hundred and sixty three dollars and thirty-six cents ($7,963.36); that with reference to the other allegations set forth in said paragraph five of the plaintiffs' bill the defendant has no knowledge and leaves it to the plaintiff to prove same.

INTERNATIONAL TRUST COMPANY,
By Attorney, THOMAS F. MEGAN.

9 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, Mass., December 6, 1920.

Then personally appeared before me A. Edward Garland, Assistant Secretary of the defendant, International Trust Company, and made oath that the answer to paragraph five of the plaintiff's bill of complaint as heretofore set forth is true.

Before me,

THOMAS F. MEGAN,
Justice of the Peace.

My Commission expires August 18, 1927.

Subsequently on the eighteenth day of December, 1920, the following petition for removal of this suit to the District Court of the United States for the District of Massachusetts, was filed, to wit:

SUFFOLK, *ss:*

In the Supreme Court.

SALEM TRUST COMPANY

v.

MANUFACTURERS' FINANCE COMPANY and INTERNATIONAL TRUST COMPANY.

Petition of Manufacturers' Finance Company for the Removal of the Above Case to the District Court of the United States for the District of Massachusetts.

To the Honorable the Justices of the Superior Court for said County:

Your petitioner respectfully shows to this Honorable Court that the matter in dispute in the above-entitled suit exceeds the sum or value of three thousand dollars ($3,000) exclusive of interest and

costs; that the International Trust Company is not a necessary party to the said suit but is a mere nominal party being only a stakeholder and without any interest whatever in the result; that the controversy in said suit is, and at the time of the commencement of the suit was, entirely between citizens of different states, to wit, your petitioner and the Salem Trust Company; that your petitioner, defendant in the above-entitled suit, was at the time of the commencement of the said suit and still is a corporation duly organized under the laws of the State of Delaware and is a citizen of the said State having its principal place of business in the
10 City of Baltimore in the State of Maryland, and that the Salem Trust Company, plaintiff in the above-entitled suit, was then and still is a corporation organized under the laws of the Commonwealth of Massachusetts and a citizen of said Commonwealth.

And your petitioner herewith presents a bond with sufficient surety for its entering in the District Court of the United States for the District of Massachusetts within thirty days from the date of filing this petition a certified copy of the record in the above-entitled suit and for paying all costs that may be awarded by said District Court if said Court shall hold that this suit was wrongfully and improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein except to make an order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said District Court of the United States for the District of Massachusetts.

MANFRS. FINANCE CO.,
By GEO. I. DITTY,
Asst. Treas.

STOREY, THORNDIKE, PALMER & DODGE,
Attorneys.

I, George I. Ditty, on oath depose and say that I am the assistant treasurer of Manufacturers Finance Company, the above named petitioner; that I have read the foregoing petition and that the facts therein alleged are true.

GEO. I. DITTY.

Subscribed and sworn to before me this second day of December, 1920.

[Notarial Seal.] ASA S. ALLEN,
Notary Public.

My Commission expires Dec. 3, 1926.

Attached to the foregoing Petition is the following Affidavit, to wit:

11 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 18272. Eq.

SALEM TRUST CO., Plff.,

v.

MANFGRS. FINANCE CO., Deft.

Affidavit of Notice of Motion.

I, Charles F. Choate 3d (Attorney in behalf of) the above named defendant make oath that on the seventeenth day of December, A. D. 1920, I gave notice in writing to the plaintiff in the above entitled action that I should make a motion in the Equity Session, First Division of said court, at Boston, on Friday, the twenty-fourth day of December, A. D. 1920, at 10 o'clock, in the forenoon, such notice was given by mailing a letter, postage prepaid, containing a copy of proposed motion directed to H. V. Harper, Esq., 60 State Street, Boston. CHARLES F. CHOATE, 3d.

Boston, December 17, 1920.

Subscribed and sworn to before me,
GEORGE A. SCHEELE,
Notary Public.

Attach this affidavit to the motion.

Also on said eighteenth day of December, 1920, the following Affidavit of Service of Notice was filed, to wit:

16th December, 1920.

A. V. Harper, Esq., Attorney for Salem Trust Company, 60 State Street, Boston, Mass.:

DEAR SIR:

You are hereby notified that in the case of Salem Trust Company v. Manufacturers Finance Company entered in the Suffolk County Superior Court on the first Monday of this month the defendant will file tomorrow a petition and bond for the removal of said case to the District Court of the United States for the District of Massachusetts.

Yours truly,
STOREY, THORNDIKE, PALMER & DODGE,
Attorneys for Manufacturers Finance Company.

12 COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

December 16, 1920.

Then personally appeared Hawley K. Rising of Storey, Thorndike, Palmer & Dodge, attorneys for the above-named defendant, and made oath that on December 16, 1920, he served a notice on the Salem Trust Company, of which the foregoing is a true copy, by leaving the same at the office of A. V. Harper, Esq., 60 State Street, Boston, attorney for said company, before me,

ROBERT G. DODGE,
Notary Public.

And on said eighteenth day of December, 1920, the following Bond, with surety approved by the court, was filed, to wit:

Removal Bond.

Know All Men By These Presents that Manufacturers Finance Company, a corporation duly organized under the laws of Delaware and having its principal place of business in Baltimore in the State of Maryland, as principal, and American Surety Company of New York, a corporation organized under the laws of the State of New York and authorized to transact business in the Commonwealth of Massachusetts and having a usual place of business in Boston in said Commonwealth, as surety, are held and firmly bound unto the Salem Trust Company, a corporation duly organized under the laws of said Commonwealth in the sum of five hundred dollars ($500) for the payment of which well and truly to be made unto the said Salem Trust Company we bind ourself and our successors jointly and severally and firmly by these presents; upon condition nevertheless that,

Whereas the above named Salem Trust Company has heretofore brought a suit of civil nature in the Superior Court for the County of Suffolk and Commonwealth of Massachusetts against the said Manufacturers Finance Company and another, and whereas the said Manufacturers Finance Company simultaneously with the filing of this bond intends to file its petition in the said suit in said Superior Court for the removal of said suit into the District Court
13 of the United States for the District of Massachusetts, according to the provisions of the act of Congress in such cases made and provided;

Now, therefore, the condition of this obligation is such that if the said petitioner, Manufacturers Finance Company, shall enter in the said District Court within thirty days from the date of filing said petition a certified copy of the record in said suit and shall pay all costs that may be awarded by the said District Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in

such suit, if special bail was originally requested therein, then this obligation shall be void but shall otherwise remain in full force and virtue.

In Witness Whereof the said Manufacturers Finance Company and the said American Surety Company of New York have caused these presents to be signed and their respective corporate seals to be hereto affixed by their duly authorized officers this sixth day of December, 1920.

[SEAL.] MANUFACTURERS' FINANCE CO.,
By E. C. EVANS,
Treasurer.

Attest:
M. S. FORNE,
Secretary.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By FRED L. ROBERTS,
Resident Vice-President.

Attest:
GEORGE F. FELLOWS,
Resident Assistant Secretary.

And the following was endorsed on said Bond for removal, to wit:

"SUFFOLK, *ss:*

Boston, Jan. 4, 1921.

Within Bond is accepted by the Court.

WAIT, *J.*

Attest:
H. E. BELLEW,
Asst. Clerk."

And the following was endorsed on said Petition for Removal, to wit:

"SUFFOLK, *ss:*

Boston, Jan. 4, 1921.

Petition and Bond accepted by the Court, after hearing.

WAIT, *J.*

Attest:
H. E. BELLEW,
Asst. Clerk."

14 And now on this eighth day of January, A. D. 1921, the above-entitled action is still pending, the time for exceptions or appeal not having expired.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this eighth day of January, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] FRANCIS A. CAMPBELL,
Clerk.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 18272. Equity.

THE SALEM TRUST COMPANY

vs.

MANUFACTURERS' FINANCE COMPANY and Another.

Docket Entries.

Counsel for Complainant:

Harper & Burhoe.

Counsel for Respondent:

1920, Oct. 29, Storey, Thorndike, Palmer & Dodge for Manufacturers' Finance Company.
1920, Oct. 29, T. F. Moran for International Trust Company.

Bill Entered October 25, 1920.—Notice ordered to show cause &c. returnable Friday, October 29, 1920, at 10 A. M., with restraining order under 2d prayer. Subpœna returnable December. Notice and restraining order issued.
October 29.—Subpœna, notice and restraining order returned with service (1).
December 6.—Answer of International Trust Company (2).
December 18.—Petition for Removal to District Court of United States (3). Affidavit of Notice (4). Removal Bond (5).
January 4, 1921.—Petition and Bond accepted by the Court.
January 8, 1921.—Copies prepared for District Court of the United States for the District of Massachusetts.
Copy.

(January 8th, A. D., 1921.)

Attest:
FRANCIS A. CAMPBELL,
Clerk.

15 On the said tenth day of January an answer was filed by the Manufacturers Finance Company.
At the same term, to wit, January 27, 1921, the following Motion to Remand was filed:

Motion to Remand.

[Filed January 25, 1921.]

Now comes the plaintiff by its attorneys, Harper & Burhoe, and appearing specially for the purposes of this motion only, and for no other purpose, and expressly denying that this court has jurisdiction of this cause and the plaintiff therein, respectfully moves the court to remand this cause to the Superior Court of Suffolk County, State of Massachusetts, from whence it was removed, for the reason that the International Trust Company, one of the defendants in this action, is a necessary party to said suit and was at the time of the commencement of said suit and still is a corporation organized and existing under the laws of the State of Massachusetts and a citizen of said State; that your plaintiff was at the time of the commencement of said suit and still is also a corporation organized and existing under the laws of said State of Massachusetts and is a citizen of said State; and that therefore since both the plaintiff and one of the defendants are citizens of the same State and not of different States, said suit has been improperly removed from said Superior Court of Massachusetts to this court.

And your plaintiff further prays that this court shall make such order as to costs as shall be just.

Plaintiff, SALEM TRUST COMPANY.
By Its Attorneys, HARPER & BURHOE.

Also at the same term, to wit, January 25, 1921, this cause came on to be heard on the foregoing motion to remand, and it was ordered by the court, the Honorable George W. Anderson, Circuit Judge, duly assigned to hold said District Court, sitting, that the said motion to remand be denied.

This cause was thence continued to the present March
16 Term, A. D. 1921, when, to wit, April 11, 1921, the following Motion to Amend Answer and Amended Answer is filed and allowed:

Motion to Amend Answer and Amended Answer.

[Filed and Allowed April 11, 1921.]

The defendant Manufacturers' Finance Company moves to amend its answer heretofore filed by striking out the same and substituting therefor the following amended answer.

STOREY, THORNDIKE, PALMER & DODGE.
Attorneys for Manufacturers' Finance Company.

Amended Answer.

This defendant admits on information and belief that the plaintiff had loaned to the Nelson Blower & Furnace Company the sum of

$40,000 as alleged in paragraph 1 of the bill, and that by way of substitution of collateral the Nelson Blower & Furnace Company executed and delivered to the plaintiff the document of which a copy is annexed to the bill and marked "Exhibit A". And this defendant admits that on July 15, 1919, the Nelson Blower & Furnace Company assigned to this defendant certain sums of money due or to become due from said Murray & Tregurtha Corporation and that said assignment was made without any disclosure to it of the aforesaid document, Exhibit A, of the existence of which document or of any alleged assignment by the Nelson Blower & Furnace Company to the plaintiff this defendant was entirely ignorant until long after it had paid full value for the aforesaid assignment to it. This defendant admits the allegations of paragraph 1 of the bill with reference to the receivership of the Nelson Blower & Furnace Company and the conduct of its business by the receiver. The defendant denies the remaining allegations of said paragraph.

2. This defendant is ignorant as to when the plaintiff learned of the aforesaid assignment to this defendant, but admits that shortly after the time of said receivership both parties claimed the proceeds then due or thereafter to become due from the said Murray & Tregurtha Corporation. This defendant denies that the accounts were assigned to the plaintiff, but admits that the accounts claimed by it were as described in paragraph 2 of the bill. And this defendant admits that at the time of the receivership the contract for the construction of certain engines referred to in said paragraph was only partially completed, and this defendant denies the remaining allegations of said paragraph 2.

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3. This defendant admits the allegations of paragraph 3 of the bill except in so far as they are allegations concerning the substance and legal effect of the instrument in writing, a copy of which is annexed to the bill and marked "Exhibit C," and as to such allegations this defendant begs leave to refer to said document as setting forth the exact agreement of said parties.

4. This defendant admits that with the plaintiff's consent it made an arrangement with the receiver, the terms of which are set forth in the contract, of which a copy is annexed to the bill marked "Exhibit D," but the defendant says that the said contract was not executed until February 24, 1920, and the defendant denies the remaining allegations of said paragraph 4.

5. This defendant denies that the receiver completed the contract with the Murray & Tregurtha Corporation. It admits the remaining allegations of paragraph 5 of the bill, except that it says that from the amount originally deposited with the International Trust Company certain proper expenses have been paid so that the amount on deposit when this suit was begun was $7,963.36.

STOREY, THORNDIKE, PALMER & DODGE,

Solicitors for Manufacturers' Finance Company.

ANDERSON, *J.*:

Allowed April 11, 1921, plaintiff assenting.

On the sixth day of May, A. D. 1921, the following Agreed Facts are filed, by leave of court, as of April 11, 1921:

Agreed Facts.

[Filed by Leave of Court on May 6, 1921, as of April 11, 1921.]

It is agreed for the purpose of hearing and determining this cas in the District Court of the United States, District of Massachusetts, and on appeal to the Circuit Court of Appeals, that the follow-
18 ing facts are true so far as material. The court may draw all reasonable and proper inferences from the facts herein stated. Either party may offer and introduce any material and competent testimony not inconsistent herewith.

The plaintiff is a corporation under the laws of Massachusetts and is a citizen of Massachusetts, having its usual place of business in Salem. The defendant Manufacturers' Finance Company (hereinafter called the Finance Company) is a corporation organized under the laws of Delaware, and a citizen of said State, having a usual place of business in Boston. The defendant International Trust Company is a Massachusetts corporation, and a citizen of said Commonwealth.

On May 15, 1919, the Nelson Blower & Furnace Company (hereinafter called the Nelson Company), a Massachusetts corporation, having its principal place of business in Boston, assigned to the plaintiff, for valid consideration, the indebtedness due and to become due said Nelson Company to the amount of forty-five thousand (45,000) dollars from the Murray & Tregurtha Corporation, also incorporated and doing business in Massachusetts, under a contract whereby said Nelson Company was to construct for said Murray & Tregurtha Corporation thirty marine engines at twenty-five hundred (2,500) dollars each.

On July 15, 1919, said Nelson Company assigned to the defendant Finance Company, for valid consideration, the same indebtedness to the amount of forty thousand (40,000) dollars. On September 20, 1919, said Nelson Company assigned to the defendant Finance Company, for valid consideration, the same indebtedness to the further amount of ten thousand (10,000) dollars.

On or about last-named date, said Finance Company, having no knowledge of the assignment to the plaintiff above referred to, duly notified the Murray & Tregurtha Corporation of said assignments to the Finance Company. It was not until a few days later that the Murray & Tregurtha Corporation had any knowledge of the aforesaid assignment to the plaintiff either from the plaintiff or through any other source.

The amount advanced by the Finance Company as consideration for its assignments, no part of which has been repaid, exceeds
19 said amount on deposit in the International Trust Company.

More than that amount is still due, also, upon the note of said Nelson Company now held by the plaintiff as part collateral for which the above mentioned assignment to it was made.

On September 26, 1919, said Nelson Company was placed in the hands of a receiver by a decree of this court in equitable proceedings, and on or about said date the plaintiff and the defendant Finance Company each first learned of the assignment to the other. When the receiver took possession, the work of constructing the engines for the Murray & Tregurtha Corporation, as aforesaid, was in process, but was unfinished, and the receiver consented to go on with it only on the understanding that his expenses in connection therewith should be paid in priority to the assignments.

On October 6, 1919, the plaintiff and the Finance Company entered into an agreement, a copy of which is hereto annexed and marked "Exhibit No. 1," and on the same day the plaintiff assigned its interest in the indebtedness under its said payment of May 16, 1919, to the Finance Company as trustee under said agreement. The receiver thereafter performed most of the work required to complete the contract aforesaid between the Nelson Company and the Murray & Tregurtha Corporation and received therefor the sum of sixty thousand (60,000) dollars, of which he retained fifty-one thousand three hundred and sixty-five dollars and ninety cents ($51,365.90) to reimburse him for his expenses in connection therewith, and turned over the balance, amounting to eight thousand six hundred and thirty-four dollars and ten cents ($8,634.10), to said Finance Company as trustee under said agreement (Exhibit No. 1), which it deposited in said International Trust Company pursuant to the terms of said agreement. The work under the contract with the receiver was not fully completed, and five thousand (5,000) dollars was therefore withheld from the contract price.

A certain sum has since been withdrawn on account of the expenses of the trustee, referred to in section 3 of Exhibit 1, and a certain amount of interest has been allowed by the Trust Company, so that at the time when this suit was brought there was on deposit in said Trust Company, in the name of the Manufacturers' Finance
20 Company as trustee, seven thousand nine hundred and sixty-three dollars and thirty-six cents ($7,963.36), which is the entire amount available for the satisfaction of the plaintiff's and defendant's respective assignments.

The only question, aside from that of jurisdiction, raised by the pleadings on these agreed facts is: Which of the two parties, the Salem Trust Company or the Manufacturers' Finance Company, is entitled to said fund?

ASA P. FRENCH,
ARTHUR V. HARPER,
HARPER & BURHOE,
For Plaintiff.
ROBERT G. DODGE,
(P.,)
For Defendant Manufacturers' Finance Company.
THOMAS P. MEGAN,
Attorney for International Trust Company.

May 9, 1921.

This may be filed as of April 11, 1921.

G. W. ANDERSON,
Circuit Judge.

EXHIBIT No. 1.

This Agreement made this 6th day of October, 1919, by and between Manufacturers' Finance Company, a Delaware corporation, having an office in Boston, Massachusetts, first party, and Salem Trust Company, a Massachusetts corporation, having an office in Salem, Massachusetts, a second party,

Witnesseth that

Whereas the Murray & Tregurtha Corporation (hereinafter called the Corporation) and the Nelson Blower & Furnace Company (hereinafter called Nelson Company), have entered into a contract whereby said Corporation has delivered certain raw materials to the Nelson Company which the Nelson Company is to fashion into certain machinery under a compensation to be paid by the Corporation to the Nelson Company amounting as the parties hereto believe, to the sum of seventy-five thousand dollars ($75,000) or thereabouts, and

Whereas the Nelson Company has assigned to the first party
21 accounts receivable of the Nelson Company due and to become due from the Corporation under said contract amounting to fifty thousand dollars ($50,000) and the first party is now the owner of said accounts receivable under said assignment, and

Whereas the Nelson Company has assigned to the second party as pledgee accounts receivable due and to become due to the Nelson Company by the Corporation under said contract amounting to forty-five thousand dollars ($45,000) and the second party is now the owner of said accounts receivable so assigned, and

Whereas the Nelson Company is now in the hands of a Receiver, and has not completed the work under its aforesaid contract with the Corporation, and

Whereas the parties hereto cannot agree as to which party hereto has priority under its respective assignment to the accounts accrued and to secure under the aforesaid contract between the Nelson Company and the Corporation, and it is deemed expedient by the parties hereto that, in order to facilitate the collection of said assigned accounts due and to become due, all said assigned accounts shall be collected by the first party in trust for the benefit of the respective owner or owners thereof, and that all questions as to such ownership shall hereafter be agreed upon by the parties hereto or be decided by some Court of competent jurisdiction, and

Whereas the parties hereto have given a joint written notice to the Nelson Company and to the Corporation to pay such accounts assigned to the parties hereto, as aforesaid, to the first party:

Now, Therefore, for and in consideration of one dollar to each in hand paid by the respective parties hereto, the receipt whereof

is hereby acknowledged, and in consideration of these presents, the parties hereto agree with each other as follows:

1. The first party shall collect all said assigned accounts receivable of the Nelson Company in the name of the first party, but in trust, for such of the parties hereto as shall hereinafter be agreed upon by the parties hereto or found by some court of competent jurisdiction to be respectively entitled thereto. The first party shall deposit all of the proceeds of such assigned accounts receivable in the International Trust Company of Boston in a special ac-
22 count in the name of the first party as Trustee, there to remain subject to the terms hereof and for the purposes hereof.

2. The first party shall have full power to collect all of such assigned accounts receivable, and for all such purposes shall hold the legal title to the same, with full power to bring any suit, thereon in its own name, and for the purposes hereof the parties hereto have, by a separate assignment of even date herewith, assigned all their respective right, title and interest in and to each and all assigned accounts receivable of said Nelson Company to the first party, but in trust, and subject to the terms hereof.

3. The first party shall only be entitled to retain from the funds representing the collection of such accounts receivable all of its cash expenses sustained in making such collection.

4. The first party shall give reports on demand of all collections to the second party.

5. If the Nelson Company or the Corporation shall pay to the second party any sum or property on account of said assigned accounts, the second party agrees to forthwith turn the same over to the first party to be held by it in trust under the terms hereof.

6. If the parties hereto shall not be able to agree upon the ownership of the proceeds of any of such accounts, then the question of such ownership shall be determined by a proper proceeding or proceedings in some Court of competent jurisdiction, which proceeding or proceedings may be brought by either party hereto at any time.

In Witness Whereof the parties hereto have caused these presents to be executed in duplicate and their corporate names to be hereto affixed by their respective officers, hereunto duly authorized, on the day and year first above written.

MANUFACTURERS' FINANCE COMPANY,
By A. W. BROOKS,
Vice-President.
SALEM TRUST COMPANY,
By M. W. BARBER,
President.

This cause is thereupon set down for hearing and fully heard by the court on April 11, 1921, the Honorable George W. An-

23 derson, Circuit Judge as aforesaid, sitting, and on the twelfth day of said April a memorandum of decision is announced.

On the sixth day of May, A. D. 1921, the following Final Decree is entered:

Final Decree.

May 6, 1921.

ANDERSON, *J.:*

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it appearing that the defendant Manufacturers' Finance Company is as a matter of law upon the agreed facts entitled to the sum on deposit in the International Trust Company, it is ordered, adjudged and decreed that the bill be dismissed without costs.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

Agreed to as to form.
ASA P. FRENCH.
R. G. DODGE,
(P.)
THOMAS F. MEGAN.

From the foregoing final decree the plaintiff claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and, bond being waived, said appeal is allowed accordingly.

Plaintiff's Requests for Rulings and Findings.

[Filed April 11, 1921.]

Now comes the plaintiff in the above-entitled cause, and requests the court to rule and find as follows:

1. To rule that, upon all the evidence, the plaintiff is entitled to the relief prayed for in its bill.

2. To find that the settled law of this Commonwealth, as announced in the decisions of the Supreme Judicial Court, is that, as between conflicting assignments of the same chose in action, the earlier in point of time is entitled to priority, whether notice of such assignment has been given to the debtor or not.

3. To rule that this announcement of the law by this Commonwealth through its highest tribunal (as well as inferentially
24 by its legislature, R. L. c. 173, sec. 4) has created a right affecting property which all the world is justified in assuming will be protected not only in the courts of the State, but by the Federal courts sitting in this District

4. To rule that the plaintiff's assignment being prior in point of time to that of the Manufacturers' Finance Company, the plaintiff

is entitled to recover the amount on deposit in the International Trust Company by virtue of the provisions of the agreement (Exhibit H) annexed to the agreed facts.

5. To rule that the Nelson Blower & Furnace Company, having sold all its interest to the extent of $45,000 in the payments due and to become due it under its contract (Exhibit B) with the Murray & Tregurtha Corporation to build thirty marine engines, had no interest therein left to assign to the Manufacturers' Finance Company on July 21 and September 20, 1919, unless it was the excess, if any, of the amount due or to become due said Nelson Company over and above $45,000.

6. To rule that, upon all the evidence, the plaintiff's and defendant Manufacturers' Finance Company's rights to the amount on deposit in the International Trust Company are determined by the agreement (Exhibit H), and that, in view of the recitals in said agreement and the letter (Exhibit I), neither can now *can* be heard to say that the Nelson Blower & Furnace Company did not make an assignment operative to pass title in said amount on deposit to that one of the two claimants whose assignment has priority of right over the others.

7. To rule that, upon all the evidence, the defendant International Trust Company is an indispensable party to this suit, and that, it being a resident and citizen of Massachusetts, this court has no jurisdiction of this cause.

Memorandum of Decision.

April 12, 1921.

ANDERSON, *J.:*

This case falls within a very narrow compass. The single question is, whether, as between two successive assignees of a chose in action, the second assignee having given notice to the debtor before the first assignee, the second assignee has the better title. The English rule is laid down in Dearle v. Hall, 3 Russell, 1, and is contended to be the rule in the Federal Court. See In re Letherman, etc., 260 Fed. 543, 547. Methven et al. v. Staten Island L., H. & Power Co., 66 Fed. 113. Judson v. Corcoran, 17 Howard, 612, 614.

If this rule prevails in this court, there must be a decree in favor of the defendant Manufacturers' Finance Company.

The Massachusetts rule is in favor of the prior assignee. See Thayer v. Daniels, 113 Mass. 120, 131. Herman v. Connecticut Mutual Life Insurance Company, 218 Mass. 181, 185, and cases cited.

Agreeing with counsel for the Salem Trust Company, that it is exceedingly unfortunate that one rule should be adopted in the Massachusetts courts and another rule in the Federal court sitting in Massachusetts, I am constrained by my view of the authorities to

hold that the Federal rule is the English rule, and there must consequently be a decree for the Manufacturers' Finance Company. It follows that plaintiff's requests for rulings, so far as inconsistent with this result, should be denied and the plaintiff's rights fully saved.

Decree accordingly.

Plaintiff's Petition for Appeal.

[Filed May 11, 1921.]

Now comes Salem Trust Company, the plaintiff in the above-entitled cause, and feeling itself aggrieved by the final decree of this court entered on the sixth day of May, 1921, prays that an appeal may be allowed to it from said decree to the United States Circuit Court of Appeals for the First Circuit, and in connection with this petition herewith presents its assignment of errors.

SALEM TRUST COMPANY,
By Its Attorneys, ASA P. FRENCH,
HARPER & BURHOE.

26 *Appellant's Assignment of Errors.*

[Filed May 11, 1921.]

Now comes Salem Trust Company, appellant in the above-entitled cause, and, in connection with its petition for appeal, says that, in the record, proceedings, and in the final decree in said cause, manifest error has intervened to the prejudice of the appellant, to wit:

1. That the court erred in dismissing the complaint.

2. That the court erred in refusing to rule that, upon all the evidence, the plaintiff is entitled to the relief prayed for in its bill.

3. That the court erred in holding, in substance, that the Federal rule with respect to priority of claim as between successive assignees of the same non-negotiable chose in action, is the English rule, so-called; and that there must consequently be a decree for the defendant Manufacturers' Finance Company.

4. That the court erred in refusing to rule that, the assignment to the plaintiff being prior in point of time to those to the Manufacturers' Finance Company, the plaintiff is entitled to recover the amount on deposit in the defendant International Trust Company by virtue of the provisions of the agreement, Exhibit 1, annexed to the agreed facts.

5. The court erred in refusing to rule that the Nelson Blower & Furnace Company having sold all its interest, to the extent of $45,000, in payments due and to become due it under its contract

with the Murray & Tregurtha Corporation to build thirty marine engines, had no interest therein left to assign to the Manufacturers' Finance Company on July 21 and September 20, 1919, unless it was the excess, if any, of the amount due or to become due said Nelson Company over the above said $45,000.

6. That the court erred in refusing to rule that upon all the evidence the defendant International Trust Company is an indispensable party to this suit, and that, inasmuch as it is a resident and citizen of Massachusetts, the District Court acquired no jurisdiction of this cause.

27 7. That the court erred in refusing to remand said cause to the State court.

SALEM TRUST COMPANY,
By Its Attorneys, ASA P. FRENCH,
HARPER & BURHOE.

Waiver of Bond and of Court Costs by International Trust Company.

[Filed May 11, 1921.]

In the above entitled cause the defendant International Trust Company hereby waives the plaintiff's bond to secure said defendant its costs on appeal.

THOMAS F. MEGAN,
Attorney for Defendant.

Waiver of Bond and of Court Costs by Manufacturers' Finance Company.

[Filed May 11, 1921.]

In the above-entitled cause the defendant Manufacturers' Finance Company hereby waives the plaintiff's bond to secure said defendant its costs on appeal.

R. G. DODGE,
(P.,)
Attorney for Defendant.

Stipulation as to Printing Exhibits.

[Filed May 11, 1921.]

In the above-entitled cause it is hereby agreed that none of the exhibits referred to in the bill of complaint and annexed thereto shall be printed, for the reason that the exhibits therein designated "A", "B" and "D" are immaterial to the issue raised by this appeal,

and Exhibit C is printed as an exhibit attached to the agreed facts, and marked "Exhibit 1".

ASA P. FRENCH,
HARPER & BURHOE,
Attorneys for Plaintiff.

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R. G. DODGE,
(P.,)
Attorney for Defendant Manufacturers' Finance Company.

T. F. MEGAN,
Attorney for Defendant International Trust Company.

May 6, 1921.

ANDERSON, *J.*:

Approved.

Attest:

JOHN E. GILMAN, JR.,
Deputy Clerk.

Agreement as to Record on Appeal.

[Filed May 11, 1921.]

It is hereby agreed between the parties that the following documents shall make up the record on appeal before the Circuit Court of Appeals:

1. Bill of complaint.
2. Defendants' answers.
3. Petition for removal.
4. Removal bond and order of Superior Court.
5. Motion to remand.
6. Order of District Court denying motion to remand.
7. Agreed facts and plaintiff's requests.
8. Memorandum of decision.
9. Order and decree of the District Court.
10. Petition for appeal.
11. Assignment of errors.

12. Citation on appeal.
13. Clerk's certificates.

ASA P. FRENCH,
HARPER & BURHOE,
Attorneys for Plaintiff.

R. G. DODGE,
Attorney for Defendant Manufacturers' Finance Company.

T. F. MEGAN,
Attorney for Defendant International Trust Company.

29 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Manufacturers' Finance Company, a corporation organized under the laws of the State of Delaware and having a usual place of business in Boston, Suffolk County, Massachusetts, and the International Trust Company, a banking corporation organized under the laws of the Commonwealth of Massachusetts, with a usual place of business in said Boston, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the first day of June next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein The Salem Trust Company, a banking corporation organized under the laws of the Commonwealth of Massachusetts with a usual place of business in Salem, Essex County, Massachusetts, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge duly assigned to hold the District Court of the United States for the District of Massachusetts, this eleventh day of May, in the year of our Lord one thousand nine hundred and twenty-one.

GEORGE W. ANDERSON,
United States Circuit Judge.

Acknowledgment of Service of Citation.

Service of the within citation is hereby acknowledged.

R. G. DODGE,
Attorney for Manufacturers' Finance Company.

T. F. MEGAN,
Attorney for International Trust Company, Defendant.

30 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing are true copies of the papers as agreed upon by the parties as being the portions of the record of said District Court to be included in the record on appeal in the cause in equity entitled, No. 1058, the Salem Trust Company, Plaintiff, v. Manufacturers' Finance Company Et Al., Defendants, in said District Court determined, together with the original Citation, with the Acknowledgment of Service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this first day of June, A. D. 1921.

[SEAL] JAMES S. ALLEN,
Clerk.

31 United States Circuit Court of Appeals for the First Circuit,
October Term, 1921.

No. 1515.

THE SALEM TRUST COMPANY, Paintiff, Appellant,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants, Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Bingham, Johnson, and Brown, JJ.

Opinion of the Court.

April 11, 1922.

BINGHAM, *J.:*

This is a bill in equity brought by the Salem Trust Company, a Massachusetts corporation, against the Manufacturers' Finance Company, a Delaware corporation, and the International Trust Company, a Massachusetts corporation, to establish the alleged right of the Salem Company as against the Finance Company to a sum deposited by the Finance Company with the International Trust Company.

The suit was originally brought in the Superior Court of Massachusetts, but was removed by the Finance Company to the District Court on the ground of diverse citizenship. After removal the plaintiff, the Salem Company, filed a motion to remand the cause, which was denied.

32 The case was then heard on agreed facts from which it appears that, on May 16, 1919, the Nelson Blower & Furnace Company assigned to the Salem Company the indebtedness, to the amount of $45,000, of the Murray & Tregurtha Corporation to it under a contract for the construction of certain marine engines; that, on July 15, and again on September 20, 1919, the Blower & Furnace Company assigned the same indebtedness to the defendant, the Finance Company,—on the former date to the amount of $40,000 and on the latter $10,000; that all of the assignments were for a valid consideration; that on or about September 20, 1919, the defendant, the Finance Company, having no knowledge of the assignment to the plaintiff, notified the Murray & Tregurtha Corporation of the assignment to it; that at that time the Murray & Tregurtha Corporation had no knowledge of the assignment to the plaintiff and did not learn of it until later; that on September 26, 1919, the Blower & Furnace Company was placed in the hands of a receiver who completed the contract with Murray & Tregurtha only on the understanding that his expenses should be paid in priority to the assignments; that, on October 6, 1919, the plaintiff and defendant, having learned of the assignments, entered into an agreement reciting the facts as to the assignments; that the parties were in dispute as to their respective rights, and providing that the defendant should collect the account and deposit the proceeds in the International Trust Company in a special account in the defendant's name as trustee; and that if the parties could not agree upon the ownership of the proceeds, the question should be determined in some court of competent jurisdiction upon a proceeding brought by either party; that in pursuance of this agreement the defendant collected $8,634.10, which it deposited as agreed in the International Trust Company; that after deducting the cash expenses incurred in making such collection the amount on deposit was $7,963.36, the sum in dispute.

In the court below it was held that, inasmuch as the defendant was the first to give notice of its assignment to Murray & Tregurtha, it was entitled to the fund even though its assignment was later
33 in time *to* that of the plaintiff, and a decree was entered dismissing the bill.

It is from this decree that the present appeal is taken, and the assignments of error present two questions: (1) Did the District Court err in refusing to remand the cause; and (2) in ruling that, as between two successive bona fide assignees of the same chose in action the second prevails if he was the first to give notice to the debtor.

The International Trust Company was not a necessary party defendant. It had no interest in the subject-matter litigated, but held the sum in dispute as the agent or depositary of the defendant, the Finance Company. By the sixth article of the contract the parties did not agree upon any particular court to determine the controversy between them, but left that question for determination by any court of competent jurisdiction; and as the International Trust Company was at most a nominal party only, the motion to remand was rightly denied. Walden v. Skinner, 101 U. S. 577; Barney v. Latham, 103 U. S. 205; Bacon v. Rives, 106 U. S. 99; Ex parte Nebraska, 209 U. S. 436.

We are also of the opinion that the ruling of the court below, that the assignee who first gave notice had the prior right, though the assignment to him was later in date, was correct; and that the question decided is one of general jurisprudence as to which the decisions of the highest courts of a State are not controlling Methven v. Staten Island Light & Power Co., 66 Fed. 113; and In re Leterman, Becher & Co., 260 Fed. 543, in which certiorari was denied October 20, 1919, by the Supreme Court, 250 U. S. 668, under the name of Coleman & Co. v. Tawas Co. The ruling was in conformity with the well-established rule in the Federal courts that the party who first gives notice of his assignment is to be regarded as having the greater equity. Judson v. Corcoran, 17 How. 612; Spain v. Hamilton's Administrator, 1 Wall. 604; Laclede Bank v. Schuler, 120 U. S. 511, 516; Methven v. Staten Island Light, Heat & Power Co., 66 Fed. 113; In re Leterman, Becher & Co., 260 Fed. 543; Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 637-639; 5 C. J. pp. 953, 954, 955, s. 135.

34 The law of Massachusetts relating to the assignment of choses in action is the same as that of New York and the facts in the cases cited from the Second Circuit (66 Fed. 113 and 260 Fed. 543) differ in no material respect from those now before us; namely, the applicability of the State or the Federal rule and the limitations of the latter. The questions presented are therefore the same as those that were before the court in the Second Circuit, the decision of which the Supreme Court declined to review on certiorari. As these questions were definitely presented in the certiorari proceeding and were of general importance in that their decision by the Court of Appeals in the Second Circuit involved a conclusion at variance with the law of New York as well as with that of many other states, the action of the Supreme Court in declining to review the decision is hardly conceivable unless it was satisfied the decision was right.

The decree of the District Court is affirmed, with costs to the Manufacturers' Finance Company, appellee, in this court.

BROWN, *J.*, Dissenting:

The case presents a question of priority of the rights of successive assignees of sums due or to become due upon a contract for the construction of marine engines. The debtor has discharged its obligation by payment, and by agreement of the assignees the fund is held until decision upon the conflicting claims of the two assignees.

It is conceded that under the law of Massachusetts the fund belongs to the Salem Trust Company, the first assignee. The Manufacturers' Finance Company, the second assignee, claims that the law of Massachusetts is inapplicable, and that the rights of the parties are to be decided upon what is called "the law of the Federal Courts" on a question of general jurisprudence.

Our first inquiry is whether the case is controlled by the law of Massachusetts.

The contract which created the debt was a Massachusetts contract, between two Massachusetts corporations. Under this contract the Murray & Tregurtha corporation was to pay $2,500 each for

35 thirty marine engines. The Nelson Blower Company was to construct the engines.

On May 16, 1919, the Nelson Company assigned the indebtedness due and to become due on said contract, to the amount of $45,000, to the Salem Trust Company, a Massachusetts corporation. If valid, this assignment covers the entire fund in controversy.

As these transactions were all between citizens of Massachusetts, the settled law of that state determined, as between them, the obligations and rights of the three parties—the debtor, the assignor and the assignee. The Massachusetts decisions establish the rule that in the absence of estoppel the rights of a first assignee of a chose in action will prevail against the rights of a subsequent assignee, regardless of notice to the debtor or obligor. Thayer v. Daniels, 113 Mass. 129, 131; Putnam v. Story, 132 Mass. 205; Herman v. Conn. Mut. Life Ins. Co., 218 Mass. 181, 186; Rabinowitz v. Peoples National Bank, 235 Mass. 102, 104.

After the rights of these citizens of Massachusetts had become fixed under the law of that state, the assignor, the Nelson Company, on July 15, 1919, assigned the same indebtedness to the defendant, Manufacturers' Finance Company, a corporation organized under the laws of Delaware, but having a usual place of business in Boston, Massachusetts.

The different citizenship of the second assignee is not enough to avoid the conclusion that the second assignment, like the first, was a contract made and to be enforced in Massachusetts, and subject to the laws of that state.

The jurisdiction which a state possesses over property within its borders extends alike to tangible and intangible property. Pennington v. Fourth National Bank, 243 U. S. 269. A vested right of action is property in the same sense in which tangible things are property: Prichard v. Norton, 106 U. S. 124, 132.

"The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect
36 its validity, construction, discharge and enforcement." Von Hoffman v. City of Quincy, 4 Wall. 535, 550; Brine v. Insurance Co., 96 U. S. 627, 634-5-7-9; Halsbury's Laws of England, Vol. 4, Sec. 781, p. 356.

No reason is apparent why the second assignment is not subject to that rule, or why the law of Massachusetts relating to assignments of legal choses in action does not establish a rule of property. See 19 Yale Law Journal, 258, 260-1.

Moreover, by a statute of Massachusetts, R. L. c. 173, Sec. 4, the assignee of a legal chose in action assigned in writing has a legal right of action in his own name. He need not ask relief in equity against the debtor. This statute, unlike English statutes relating to the assignments of legal choses in action, does not require notice to the debtor. See Halsbury's Laws of Eng. Vol. 4, p. 367, note (*h*).

The rule that authoritative state decisions rendered by a state

court before the rights of the parties accrued and became fixed are presumed to be known to the parties, and form part of the contract, seems as applicable to written assignments of book accounts, or accounts receivable, as to conveyances or written instruments between private parties evidencing a transfer of real property or tangible personal property. As the state has like control over tangible and intangible property within its jurisdiction (Pennington v. Fourth Nat. Bank, 243 U. S. 269), the rule seems equally applicable to tangible and intangible property. Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370, 372.

Whether we adopt the theory that an assignment of a legal chose in action is a complete transfer of the assignor's legal right, or the theory that the assignee gets only an equitable title recognized by and enforceable in a court of law through an action in the name of the assignor or in his own name, it seems equally necessary to give effect to local decisions which have become rules of property.

It would seem sufficient for the purposes of this case to hold that the settled law of Massachusetts forms part of and controls these contracts of assignment. A foreign corporation which is
37 permitted to maintain a usual place of business in the state of Massachusetts for the transaction of local business, certainly has no right to preferential treatment as compared with resident citizens of Massachusetts, or to complain that it is subject to the same law. Horn Silver Mining Co. v. New York, 143 U. S. 305, 315; Shaffer v. Carter, 252 U. S. 37, 53. The consent of the state to its conduct of business therein of an intrastate character implies the condition that it shall assent to and be governed by the laws affecting the mode of transfer of property which govern its own citizens. That the state has assented to the making of contracts by foreign corporations which shall become superior to those of its own citizens and prejudicial to their rights of property is not to be assumed. The different citizenship of the parties does not give to the contract and interstate character or create a right to question the local policy of a state in respect to the transfer of property, tangible or intangible. Pickens v. Merriam, 274 Fed., 1, 7, 8.

If we adopt the view that under the Massachusetts decisions the Salem Trust Company, through an assignment in writing of a legal chose in action, acquired a statutory right of action in its own name, and that the assignor's legal right of action was transferred to the plaintiff, it follows, the assignor having parted with his interest by the first assignment, that the second assignee could take nothing. The second document of assignment was, therefore, as ineffective under the law of Massachusetts as any deed of property which the grantor did not own. In that view of the case we should conclude that there was, in substance, but one assignment,—the first. There would then remain no question of "equitable priority" or of "equitable preference," as these terms are generally used. This question of priority arises between merely equitable interests, and not between an equitable interest and a legal title. Pomeroy's Eq. Jur. 3d Ed., Secs. 677, 679, 1277, 1273; Judson v. Corcoran, 17 How. 612, 614.

Upon the question whether a statutory provision authorizing an assignee to sue at law in his own name betters his position and changes his right into a legal title, interest or ownership,
38 there seem to be contrary opinions. See Pomeroy's Eq. Sec. 137; In re Westerton, 1919, 2 Chan. Div. L. R. p. 104; Williston on Contracts, Vol. 1, Sec. 435, 446*a*, 447; Marsh v. Garney, 69 N. H. 236.

Assuming, therefore, that, regardless of the Massachusetts statute and decisions that we have cited, we have a question of equitable preference, we may inquire whether the second assignee can establish his right to such preference.

The Manufacturers' Finance Company, the second assignee, rests its claim to equitable priority upon the fact that it was first to give notice of its assignment to the debtor, the Murray & Tregurtha Company. We are asked to accept and apply the following rule:

"Between two successive bona fide assignees of the same chose in action, the second will prevail if he was first to give notice to the debtor."

It will be observed that this rule, as stated by Lord Macnaghten in Ward v. Duncombe, 1893, A. C. 369, 390, "gives the go-by to all considerations founded upon the conduct of the parties." This rule, which is commonly, and it seems erroneously, styled the rule of Dearle v. Hall, 3 Russ. 1, might more properly be called the rule of Foster v. Cockerell, 3 Cl. & F. 456. It was applied in that case between incumbrancers of an equitable interest in trust funds.

Both Dearle v. Hall and Foster v. Cockerell are critically examined by Lord Macnaghten in Ward v. Duncombe, who said of the rule declared in Foster v. Cockerell:

"Priority in such a case depends simply and solely upon priority of notice."

This shifting from a consideration of the conduct of both parties, and of the effect that the conduct of one might have had upon the other, to a consideration of the single question of priority of notice, was so radical a departure from the ordinary operations of the conscience of a chancellor as to evoke the remark from
39 Lord Macnaghten that the court in Foster v. Cockerell, "has gone perilously near legislating."

It is a general principle in courts of equity that, where both parties claim by equitable titles, the one who is prior in point of time is deemed the better in right. In protecting an innocent purchaser holding the legal title against one who has the prior equity, a court of equity can act only on the conscience of a party. If he has nothing that taints it, no demand can attach upon it so as to give any jurisdiction. Boone v. Chiles, 10 Pet. 177, 210. But the question of conscience is as important between equitable titles as between a legal and an equitable title. The doctrine of equitable estoppel and

the principles of negligence involve a consideration of the effect of conduct, whether action or inaction, upon the conduct of others.

When we disregard the question whether the failure of the first assignee to give notice has in fact misled or prejudiced the second assignee, and the further question whether the conduct of the obligor has been affected by the fact that notice of the second assignment preceded notice of the first assignment, there seems to be left no question of conscience and no established principle of equity which requires the reversal of the ordinary rule that he who is prior in time is prior in right.

In this case the statement of agreed facts fails to show that the second assignee made inquiry of the debtor before making its loan and taking its assignment. There is nothing which shows that it relied upon any knowledge except that furnished by the assignor, or that the failure of the first assignee to give notice influenced its conduct or that of the debtor.

I am unable to agree that the case of Dearle v. Hall, when stripped of its consideration of the important fact that the second assignee had made inquiry of the trustee and found no incumbrance before he made his loan, relying upon an apparent title, has been approved by the Supreme Court of the United States, in the cases cited by the defendant.

Judson v. Corcoran, 17 How. 612, 615, in dicta upon which defendant relies, makes express reference to the element of inquiry by the second assignee:

"There may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, * * * would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy.

"The cases of Dearle v. Hall and Loveridge v. Cooper * * * established the doctrine to the foregoing effect in England;"

In Spain v. Hamilton, 1 Wall. 604, 624, the junior transferees made inquiries. The defendant quotes from page 624:

"In order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

This relates to perfecting title not against a subsequent assignee but against the debtor. The expression "for otherwise a priority of right may be obtained by a subsequent assignee" is wholly insufficient as an approval of a rule that he may obtain it merely by giving first notice after taking the assignment.

In Baker v. Wood, 157 U. S. 212, 215, Judson v. Corcoran is cited in support of the rule of estoppel.

"We know of no case holding that a man is estopped by silence as against the public, or any particular person with whom he has no fiduciary relation."

Wiser v. Lawlor, 189 U. S. 260, 272. See also Greey v. Dockendorff, 231 U. S. 513, 516.

The discussion of Dearle v. Hall and of Foster v. Cockerell (3 Cl. & Fin. 456) by the House of Lords, in Ward v. Duncombe, 1893, App. C. 369, should be read before extending the doctrine of those cases which relate to the assignments of equitable interests to a case relating to the assignment of legal choses of action in ac-
41 cordance with the statutory law of a state. Lord Macnaghten said (p. 391):

"The learned counsel for the appellants invited your Lordships to define exactly the principle on which the doctrine of notice as established by the rule in Dearle v. Hall depends. Speaking for myself, I think that would be a very hard task. I am not sure that the doctrine rests upon any very satisfactory principle. I am not sure that it has not been established at the expense of principles at least as important as any of those to which it has been referred.

The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in Shropshire Union Railways and Canal Company v. The Queen (4): 'A pre-existing equitable title,' said Lord Cairns, 'may be defeated by a supervening legal title obtained by transfer'—he was there speaking of an equitable title to shares. Then he goes on: 'And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.'

"In defence of the rule in Dearle v. Hall, it has been said that notice is necessary in order to 'perfect' the title of the assignee—in order to 'complete' his title. Those expressions have frequently been used; but they are, I venture to think, little more than mere phrases. Notice does not render the title perfect. Notice was not even a step in the title until it was made so by the decision in Foster v. Cockerell." * * *

(4) L. R. 7, E. & I. p. 506.

"Much of the reasoning in Dearle v. Hall is founded upon Ryall v. Rowels (1). Indeed, as observed by Wigram V. C. in Wil-
42 mot v. Pike (5), it is impossible to read Sir Thomas Plumer's very elaborate judgment without seeing that his opinion as to the mode of transferring equitable interests in property not capable of actual delivery, 'was borrowed entirely from the decisions in bankruptcy as to the acts which were necessary under the statute to take a chose in action out of the order and deposition of a bankrupt.' The doctrine of reputed ownership is entirely the creature of statute, and applicable by statute in cases of bankruptcy only. I cannot help thinking that, in extending the doctrine to cases of equitable assignment of personal property where there is no bankruptcy (which is practically what was done in Foster v. Cockerell), the court has gone perilously near legislating. The inconvenience of such a course is obvious, and the result has been singular. The law relating to reputed ownership in bankruptcy has been altered from time to time. When Dearle v. Hall was decided, it extended to all choses in action. Now it does not apply to choses in action at all, except to 'debts due, or growing due, to the bankrupt in the course of his trade or business.' But the rule in Dearle v. Hall founded in great measure on the bankruptcy law as it existed sixty years ago, remains unaltered, and it is beyond the power of any Court to alter it.

"I am inclined to think that the rule in Dearle v. Hall has on the whole produced at least as much injustice as it has prevented. It was argued in Dearle v. Hall that notice to the trustees necessarily prevents fraud on the part of the assignor. 'The trustees,' said Mr. Sugden, 'are converted into a register, and by applying to them everyone who proposes to negotiate for the purchase of the fund, except in the very improbable event of the trustees incurring personal responsibility by lending themselves to the vendor's dishonest purposes, is enabled to ascertain whether any prior incumbrances exist which will prevail over the title that is to be conveyed to him.' That argument was in substance adopted by the Court."

In Lloyd's Bank v. Pearson, 1901, see C. D. Vol. 1, 865, at page 872, Cozens-Hardy, J., said:

"I have carefully read Lord Macnaghten's judgment in Ward v. Duncombe, which I accept as a guide, but I do not profess to
43 be able to discover any definite principle upon which the rule in Dearle v. Hall is founded. Nevertheless, it must now be recognized as a positive rule, though it is not one to be extended."

In 1 Ames Cases on Trusts, page 326, is a note on Dearle v. Hall, and on page 327 a quotation from Meux v. Bell, 1 Hare, 73 in which an attempt was made to answer the objection that if no inquiry is made the puisne incumbrancer has not in point of fact been deceived or injured by the neglect of the prior incumbrancer.

(1) 1 Ves. 348.

(5) 5 Hare at p. 19.

The answer seems to be that the second incumbrancer's notice has the effect of inquiry, and if he is not told when he gives his notice that there is a prior incumbrance, he thenceforward relies, and may be injured by reliance after his notice.

In the present case, however, though the second assignee took its assignment on July 15, 1919, it gave no notice until on or about September 20, 1919; six days before the assignor, the Nelson Company, was placed in the hands of a receiver. Reliance during this period cannot take the place of reliance at the time of parting with its money, as a ground for estopping the first assignee by reason of its negligence.

That inquiry by the second assignee before making his loan would have disclosed nothing affords no reason for excusing inquiry. It is true that we cannot apply the rule that he who fails to make inquiry is bound by what inquiry would have disclosed. But we may apply the rule that there can be no estoppel of the first assignee without reliance by the second assignee, and that negligence of the first which did not affect the conduct of the second, or of the debtor, has no more weight in equity than at law. In considering whether there was negligence we must consider the rule of diligence established by the state statute. Apparent ownership or reputed ownership does not mean a grantor's assertion of ownership. Ownership of the assignor is not otherwise apparent in a transaction like this until inquiry is made and no prior assignment found. Before that reliance is solely upon the word of the assignor.

The defendant relies especially upon decisions in the Second Circuit, which it must be admitted approve its contention.

44 In the earlier case of In re Gillespie, 15 Fed. 734, not cited by defendant, Judge Addison Brown qualifies the rule by the phrase "and where the latter has used all due diligence by inquiry and notice, the equity of the latter is to be preferred over that of the former."

In the case of Methven v. Staten Island Co., 66 Fed. 113, the second assignee seems to have perfected his title by acceptance of the debtor. The recent case of in re Leterman, Becher & Co., 260 Fed. 543, however, drops all qualification from the rule and rests the decision squarely upon priority of notice. I find myself unable to agree with the decision of that court, though I have given it most careful consideration.

It is also held, but without discussion of the question, that the rights of successive assignees of the same fund presents a question of "general jurisprudence". This was first held by the Circuit Court of Appeals of the Second Circuit in Methven v. Staten Island Light, Heat & Power Co., 66 Fed. 113, and was followed in In re Leterman, Becher Co., Inc., 260 Fed. 543, 547. In the latter case it was said that an assignee of a chose of action who omits to give notice is guilty of the same neglect as he who leaves a personal chattel, to which he has assumed title, in the actual possession and under the absolute control of another person.

But it should be observed that this question as concerns chattels has repeatedly been held to be a matter of local law in cases relating

to conditional sales and chattel mortgages. Etheridge v. Sperry, 139 U. S. 266; Thompson v. Fairbanks, 196 U. S. 516; Humphrey v. Tatman, 198 U. S. 91; York Mfg. Co. v. Cassell, 201 U. S. 344; Bryant v. Swofford Bros., 214 U. S. 279.

It is impossible to rely upon analogy to a fixed legal rule concerning reputed or apparent ownership of chattels, since the laws of the states differ widely on this subject. The courts of the United States have applied the rule that an assignee of a legal right of action who may have a remedy in a suit at law in the assignee's name has no right to equitable relief. Glenn v. Marbury, 145 U. S. 499, 508, 509.

Assignments of legal choses in action are in a different class
45 from assignments of strictly equitable interests. The security acquired by the assignee is to be made effective through action at law. To establish by statute or by decisions of its courts legal rules which shall regulate a transfer of such a right seems beyond question within the power of a state. Whether assignments shall be recorded in a registry or what other steps shall be taken to perfect the transfer of A's legal right to B is as truly a matter of local policy as are like questions concerning conditional sales of chattels. If an assignment in writing delivered to the assignee is deemed sufficient a court of the United States should not attempt to prescribe for the states a general rule of public policy which imposes conditions additional to or contrary to those prescribed by the laws of the state.

Can we say that the first assignment, wholly a Massachusetts contract, is not effective to pass to the assignee all the right which the assignor had at the time of assignment, because he did not notify the debtor, when by the law of the state it has been decided that he need not do so? Is he to be held negligent in failing to do what the law of the state holds he need not do? Is a citizen of Delaware doing business in Boston entitled to say that though the first assignee has a perfect title against all citizens of Massachusetts he has not such title against a citizen of Delaware? Is a debtor receiving notices from both before payment to be under an obligation in the state courts to pay the first assignee, and also under an obligation under Federal law to pay the second assignee?

In order to do complete justice to all the parties it seems necessary to provide for reimbursement of one of them by the assignor who has been paid twice. If the second assignee, who has been fraudulently induced to rely upon the assignor's statement, may, by giving notice, shift the consequences of this fraud to the shoulders of the first assignee in a Federal Court of Equity, that court must be able to afford him a remedy against the assignor.

The consequences that may follow from adopting in the Federal Courts one general rule,—the general rule that priority of notice gives priority of right,—must not be ignored. As there are
46 many states which, like Massachusetts, New York and New Hampshire, reject the rule (see also 1 Ames Cases on Trusts, 326, 327), it will override the laws of many states, unsettle rights under the laws of those states, and thus infringe the rule that the

Federal Courts administer the laws of the state; and this not upon a question of conscience, but upon a rule of policy which "gives the go-by to all considerations founded upon the conduct of the parties." Ward v. Duncombe, 1893, A. C. 369, 390. In Massachusetts or New York a second assignee might recover from the assignor on the ground of fraud or failure of consideration. The first assignee can, of course, have no right of recovery, since he has not been defrauded, he was not deceived, and the subsequent assignment was not in fraud of his right, since it did not deprive him of anything.

The assignor has been paid twice for the fund that he has assigned. The first assignee cannot in the state court recover his money from the assignor, because, under the law of the state he received full consideration. The second assignee cannot in the Federal Court recover his money, because under the rule of "general jurisprudence" he received full consideration. The first assignee loses his right to the fund by the act of the second assignee, in giving notice which creates in him a right by converting an assignment worthless under the law of the state into an assignment valid in a Federal Court of Equity. The first assignee is thus penalized by a Court of Equity for a neglect which has not had the least effect upon the conduct of the second assignee.

It is not the function of a Court of Equity to punish negligence in the abstract; nor should a Court of Equity create a law of notice which circumvents the established rules of estoppel and negligence.

The confusion introduced in the English courts of a single jurisdiction by splitting the decision in Dearle v. Hall into two distinct parts, one the question of equitable estoppel by negligence, the other the question of superior diligence in giving notice to the debtor, is apparent from reading the case of Ward v. Duncombe. The
47 confusion that will result from incorporating this rule of notice in the single system of Equity administered by the Federal Courts, while dealing with transactions arising under the laws of many independent jurisdictions, is a sufficient practical reason for rejecting the rule. If in England the rule, as Lord Macnaghten has said: "has on the whole, produced at least as much injustice as it has prevented", we should not adopt it as a fundamental rule of equity. It is not a rule of conscience, but as best a rule of doubtful and disputed policy as to the mode of transfer of substantial rights.

It is said notice must be given to protect third persons against fraud; but third persons who make no inquiry are not so protected, even if notice is given the debtor. It is inquiry of the debtor, and reliance upon the result of inquiry, a title apparently unincumbered, that may create an equity. Notice alone cannot create a right. A rule that requires notice but excuses inquiry is not a consistent rule of equity. A duty to give notice implies a duty to inquire: Halsbury's Law of Eng., Vol. 4, Sec. 821. Equity may require one to pay for the consequences of his negligence, but should not penalize negligence, when, as a matter of fact, it did no harm.

Taking the decision in Dearle v. Hall as a whole, coupling together inquiry, reliance and notice, we have the rule as stated in Somerset v. Cox, 33 Beav. 634, 639; "By means of it money may safely be lent

on security of trust funds on ascertaining that the trustee has no notice of any prior incumbrance."

As an exception to the general rule that he who is prior in time is prior in right this seems to be a reasonable rule that can be administered without contradication of the established principles of estoppel and laches. We are not required by the decisions of the Supreme Court to go further.

The further exception from that general rule of cases where the second assignee is prior merely in giving notice ex post facto is not supported by substantial reasons.

If it can be said that there is such a general probability of fraudulent action by an assignor as requires an assignee to take steps
48 for the protection of third parties; in itself a doubtful proposition; it must also be said that this probability should equally call for an inquiry by an assignee for his own protection. It is not enough for him to inquire or give notice after he has expended his money. He cannot mend his own neglect and protect himself by charging another with failure to protect him by giving notice which would not have warned him except on inquiry.

That the rule applied in Leterman, Becher Co., Inc., 260 Fed. 543, 549, is an arbitrary verbal formula, not based upon equitable principles, is illustrated by the decision on the facts of that case. The rights of assignees who dispatched notices by mail on the same day were determined by the comparative speed of a registered and an unregistered letter of notice in the mail. The first assignee, who took the reasonable precaution of registering his letter of notice, thereby made it slower and lost in the race. The clock created the superior equity.

The fact that the Supreme Court in Coleman & Co. v. Tawas Co., 250 U. S. 668, denied certiorari in In re Leterman, Becher & Co., 260 Fed. 543, adds nothing to the authority of the case in the lower court. See Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251, 257, 258.

Time is of the essence or not of the essence, according to circumstances. When, as in this case, both notices reached the debtor long before the completion of the work, and long before the date of payment, and where the money was paid over upon the joint request of both, the time of the second assignee's notification seems wholly insignificant and unsubstantial.

As either assignment would exhaust the fund in controversy it seems unnecessary, on the agreed facts, to discuss the difference between total and partial assignments, or between unconditional assignments and those made by way of mortgage or hypothecation. It is settled law that the legal effect of a transaction involving pledge or hypothecation depends upon the local law. Dale v. Pattison, 234 U. S. 399; Taney v. Penn Bank, 232 U. S. 174.

I am of the opinion that we should give effect to the rights
49 & 50 of the plaintiff-appellant under the law of Massachusetts.

I am also of the opinion that the defendant-appellee has not established upon accepted principles of equitable jurisprudence a right to an equitable preference over the prior assignee.

51 On October 13, 1921, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson, Circuit Judges, and Honorable Arthur L. Brown, District Judge, sitting.

Thereafter, to wit, on the eleventh day of April, A. D. 1922, the opinion of the court (page 31) was announced, a dissenting opinion by Brown, J. (page 34), was filed and the following Final Decree was entered:

Final Decree.

April 11, 1922.

This cause came on to be heard October 13, 1921, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 11, 1922, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, with costs to the Manufacturers' Finance Company, appellee, in this court.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on the sixth day of June, A. D. 1922, the following Motion for Stay of Mandate was filed:

Motion for Stay of Mandate.

June 6, 1922.

Now comes the plaintiff, appellant, in the above-entitled cause and represents to this Honorable Court that it intends to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore it moves that the issue of the mandate in the above-entitled cause be stayed pending the determination by said Supreme Court of its petition for said writ, or until the further order of this court.

By Its Attorneys, WARREN, GARFIELD, WHITESIDE & LAMSON.

Dated June 5, 1922.

52 On the same day, to wit, on the sixth day of June, A. D 1922, the following Order of Court was entered:

Order of Court.

June 6, 1922.

Upon motion of appellant, setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court, upon the condition that said petition is

duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 52, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including June 16, 1922, in the cause in said court numbered and entitled, No. 1515, Salem Trust Company, Plaintiff, Appellant, v. Manufacturers' Finance Company et al., Defendants, Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this sixteenth day of June, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

53 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Salem Trust Company is appellant, and Manufacturers' Finance Company et al. are appellees, No. 1515, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-
54 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

55 [Endorsed:] File No. 29024. Supreme Court of the United States, October Term, 1922. No. 474. The Salem Trust Company vs. Manufacturers' Finance Company et al. Writ of Certiorari.

56 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the transcript of record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this third day of November, A. D. 1922.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

57 United States Circuit Court of Appeals for the First Circuit.

No. 1515.

THE SALEM TRUST COMPANY, Plaintiff, Appellant,

v.

MANUFACTURERS' FINANCE COMPANY et al., Defendants, Appellees.

Stipulation.

In the above-entitled case it is stipulated that the transcript of record heretofore filed in the Supreme Court of the United States in support of the petition for certiorari may be taken as a return to the writ of certiorari.

ALEXANDER WHITESIDE,
Attorney for Plaintiff.
ROBERT G. DODGE,
Attorney for Defendants.

November 3, 1922.

A true copy.
Attest:

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

58 [Endorsed:] File No. 29,024. Supreme Court U. S., October Term, 1922. Term No. 474. The Salem Trust Co., Petitioner, vs. Manufacturers' Finance Co. et al. Writ of certiorari and return. Filed Nov. 6, 1922.